OAH 60-0320-30073
OAH 60-0320-30021

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Angela Berger,

Complainant,

vs.

John Cashmore and Richard Novack,

Respondents.

ORDER ON MOTION FOR DISMISSAL

On Friday, March 8, 2013, this consolidated matter came before a panel of three Administrative Law Judges for an evidentiary hearing: James E. LaFave (Presiding Judge); Ann C. O'Reilly and Timothy J. O'Malley.

Complainant, Angela Berger, (Complainant), appeared on her own behalf and without counsel. Respondent, Richard Novack, (Respondent Novack) appeared on his own behalf and without counsel. Steven J. Timmer, Attorney at Law, appeared on behalf of Respondent, John Cashmore (Respondent Cashmore). Respondent Novack and Respondent Cashmore shall be referred to as "Respondents."

At the close of Complainant's case in chief, Respondents made a motion to dismiss.

Based upon the testimony at the hearing, the exhibits received, all of the files, records, and proceedings herein, and for the reasons set out in the attached Memorandum,

IT IS ORDERED THAT:

1. The Respondents' motion to dismiss is **GRANTED.**

Dated: March 13, 2013

s/James E. LaFave
JAMES E. LAFAVE
Presiding Administrative Law Judge

s/Timothy J. O'Malley
TIMOTHY J. O'MALLEY
Administrative Law Judge

s/Ann O'Reilly
ANN O'REILLY
Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. § § 14.63 to 14.69.

MEMORANDUM

The Respondents prepared and distributed a postcard regarding the race for the seat in the Minnesota House of Representative from District 49A between Ron Erhardt and Bill Glahn.[1] The postcard included pictures of the candidates and the following two statements:

> (1) Bill says* "elite" persons like himself should lie to the public to achieve goals.
>
> (2) Candidate Bill Glahn actually said* that he will lie to the public, in one of his online blogs, which he has now hidden![2]

In a footnote denoted by an asterisk, the postcard attributes these two statements to a blog posting written by Mr. Glahn that was titled: "Hypocrisy is Good" and subtitled: "Wanted: More Hypocrisy in Politics." The footnote on the postcard cites specifically to a sentence in Mr. Glahn's closing paragraph of the blog which reads: "To reverse these disturbing trends, if it takes a little hypocrisy among our elites, then sign me up."[3]

The Complainant alleges the preparation and dissemination of those statements violates Minn. Stat. § 211B.06.

Minnesota Statutes Section 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of false campaign material with respect to the character or acts of a candidate that the person knows is false or communicates with reckless disregard of whether it is false.[4]

In this case, the Complainant has the burden of proving each element of her case by clear and convincing evidence.[5]

Setting aside the issue of whether the statements were false, the Complaint failed to prove by clear and convincing evidence the Respondents knew the statements were false or disseminated the statements with reckless disregard as to whether they were false.

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[1] Testimony Richard Novack; Testimony John Cashmore; *See* Ex. A.
[2] Ex. A.
[3] Ex. B.
[4] *See* Minn. Stat. § 211B.06.
[5] *See* Minn. Stat. § 211B.32, subd. 4.

In discussing the meaning of "reckless disregard" the Minnesota Supreme Court observed:

> The standard for 'reckless disregard for the truth' is a subjective one; reckless disregard does not mean 'reckless' in the ordinary sense of extreme negligence. Instead, 'reckless disregard' requires that a defendant make a statement while subjectively believing that the statement is probably false.[6]

One piece of evidence introduced into the record related to what Respondents believed about the statements is an e-mail from Respondent Novack to Respondent Cashmore dated September 10, 2012.[7] That e-mail states in pertinent part "You can't be sued for freedom of political expression about a public candidate but even then you especially can't be sued for printing documented facts albeit slanted."[8]

This could be viewed as an admission by the Respondents that the statements were "slanted." That possible admission, however, does not mean the Respondents harbored serious doubts about the truth of the statements in question. In fact, Respondent Novack set forth in a sworn Affidavit that he entirely believed the statements were grounded in fact.[9]

The Complainant failed to introduce any testimony or documentary evidence to prove the Respondents entertained any doubts, let alone serious doubts, that the statements they prepared and disseminated were false. Even though the statements disseminated by the Respondents were, perhaps, unfairly "slanted" the Complainant did not establish that they were published with "reckless disregard" for the truth.

While it can be argued that the "reckless disregard" standard puts a premium on ignorance and encourages irresponsible publishing, *New York Times v Sullivan*[10] and its progeny emphasize the stake of the public is so great that the reasonable person's standard or the "standard of ordinary care would not protect against self-censorship and thus adequately implement First Amendment polices."[11] Accordingly, unless respondents knew the statements were false or entertained serious doubts as to their veracity, the law protects the Respondents' rights to prepare and disseminate the statements in question.

Since the Claimant failed to prove by clear and convincing evidence a fundamental element of her case, she failed in her burden of proof. In the considered judgment of the Panel, dismissal is therefore warranted.

J.E.L., T.J.O, A.C.O.

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[6] *Chafoulias v. Peterson,* 668 N.W.2d 642, 654-55 (Minn. 2003).
[7] *See* Ex. K at p. 5.
[8] *Id.*
[9] *See* October 24, 2012, Affidavit of Richard Novack.
[10] *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964).
[11] *St. Amant v. Thompson,* 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968).